IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 06-12537

D. C. Docket No. 05-00266-CR-003-WHS

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

PATRICK LETT,
Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of Alabama

BEFORE: CARNES, PRYOR AND FARRIS*, Circuit Judges.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT.

/s/ ED CARNES
UNITED STATES CIRCUIT JUDGE

Ord-42
(12/01)

*Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[PUBLISH]

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For the Southern District of Alabama

(April 6, 2007)

Before Carnes, Pryor and Farris*, Circuit Judges.
CARNES, Circuit Judge:

The facts of Patrick Lett's life that gave rise to this case read somewhat like a morality play. He was born and raised in Monroe County, Alabama. He had what he described as a nice childhood. Married and divorced, he has three daughters. He served his country in the National Guard and then the regular

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting be designation.

army. Some of his service was in Iraq as part of Operation Iraqi Freedom, and all of it was honorable. He received numerous citations and medals for meritorious achievement. His superior officers used superlatives to describe him and his dedication to the missions he was assigned.

After fourteen years in the military, Lett returned to civilian life the week before Christmas in 2003. It was not a happy time for him. He had lost friends and had seen fellow soldiers killed in Iraq. He had also seen what he described as "some very, very strange things." While he was in Iraq, his fiancée died. When he returned home his father was dying. He had trouble supporting his children. He felt pressured. He was depressed. He began to drink heavily, which only helped fuel the downward trajectory of his life. Lett felt, in his words, like "the lowest person on the face of the earth."

Enter temptation in the form of his cousin, Michael. Michael was a big time cocaine distributor, or what passes for one in Monroe County. He bought powder cocaine wholesale in Montgomery for resale as cocaine and crack back home. For distribution, Michael had something of a friends and family plan. Influenced perhaps by the cultural mores of a south Alabama county, he did not rely on strangers or mere acquaintances to sell his drugs for him. Instead, he used his personal friends and members of his family.

Michael eventually prevailed upon Patrick to be one of his street level sellers, operating out of trailers, vacant houses and yards. On seven occasions during a five-week period in the Spring of 2004, Patrick Lett sold cocaine and crack cocaine to Ceonia Stanton, and sometimes to another person in Stanton's presence,

in quantities ranging from just over a gram to nearly fourteen and a half grams. It was typical drug dealer conduct. But Patrick Lett was atypical, because he was a drug dealer with a conscience. With his conscience came remorse and a search for redemption. He felt guilty about his actions. He realized, as he put it, that "it takes a cruel-hearted person to actually take advantage of someone who has a disease, and that disease is addiction," and he "decided to get on my knees and pray a little harder and ask God to pull me back together, . . . which [H]e did." Lett quit selling drugs and left Michael's operation to the devil's own devices.

Lett re-enlisted in the military in October 2004, and again he rendered exemplary service to his country. His superior officers attested that Lett, a sergeant, was an outstanding soldier, dedicated to the welfare of his men and to accomplishing whatever mission he was given. He made his men's lives better and his superiors' jobs easier. His captain said that Lett "exemplified the Army values" of "loyalty, duty, respect, selfless service, honor, integrity, personal courage." He would be willing to entrust his life to Lett.

Having pulled himself out of the world of illegal drugs and gone back to serving his country, Lett may have thought that he had left his past behind him. As Faulkner reminded us, however, "The past is never dead. It is not even past." William Faulkner, Requiem for a Nun 92 (1951). It turns out that Ceonia Stanton, to whom Lett had sold the drugs, was an undercover law enforcement agent working as part of a task force aimed at shutting down Michael Lett's operation. In September 2005, a grand jury

indicted Lett and fourteen others, including Michael, for various federal drug crimes stemming from their roles in the conspiracy. Lett pleaded guilty to seven counts of possession with intent to distribute, one for each of the sales to the undercover agent, all in violation of 21 U.S.C. § 841(a)(1).

I.

The presentence investigation report noted that Lett admitted selling 60.42 grams of crack cocaine and 7.89 grams of powder cocaine, which put his base offense level at thirty two. It recommended, and the government did not object to, that level being lowered: by two levels because he met the five criteria for a safety valve reduction; by another two levels because he accepted responsibility for his crime; and by one more level because he timely notified the government of his intention to plead guilty before it dedicated substantial resources to prosecuting him. Those reductions left an offense level of twenty seven.

With that adjusted offense level and no prior criminal record, Lett's advisory guideline range was seventy to eighty-seven months imprisonment. He faced a mandatory minimum prison sentence of sixty months on five of the counts under 21 U.S.C. § 841(b)(1)(B). About those statutory mandatory minimum sentences, and the resulting inapplicability of the U.S.S.G. § 5C1.2 safety valve provision, the PSR stated:

> Based on a total offense level of 27 and a criminal history category of I, the guideline range of imprisonment is 70 to 87 months. Counts 8, 9, 10, 11, and 12, each carry a mandatory minimum penalty of 60 months. Although it

> appears that the defendant is eligible for consideration under U.S.S.G. § 5C1.2, because the minimum of the guideline range is 70 months, which is greater than the statutory mandatory minimum 60 months, 5C1.2 consideration is a moot issue.

Neither the government nor Lett lodged any objection to the PSR, and with the consent of both parties the district court adopted it as written. Lett called three witnesses to testify for him at the sentence hearing: a sergeant, a first sergeant, and a captain, all of whose testimony we alluded to earlier in describing Lett's military service. Two of the three implored the court to impose the least sentence the law allowed. Lett himself also took the stand. He admitted the drug crimes he had committed during the short period of time two years earlier, accepted responsibility for them, described the "pride and respect and unity and honor" he feels when he puts on the uniform in service of his country, and asked the court to give him a sentence that would allow him to stay in the military so that he could continue supporting his three daughters, the oldest of whom was sixteen and pregnant.

At the end of the testimony, Lett's counsel asked the district court to put him on supervised release "or some kind of probation" or to give him "the minimum sentence possible" so that he could stay in the military. According to counsel, the Army was willing to allow Lett to continue his service if the district court sentenced him to probation. Even though he made the request, counsel acknowledged that "there's a minimum mandatory five-year sentence under the

statute, and it would be very hard for the Court to find a five-year sentence that's constitutionality excessive," so he asked the court to give the lightest sentence possible.

The district court judge was well suited to evaluate Lett's military service, having himself served for six years as an officer and pilot in the United States Marine Corps and another fourteen years in the Army National Guard as a pilot and the commanding officer of an assault helicopter company. He was sympathetic to Lett and impressed with how different this case was from others he had seen. Lett's complete lack of any prior criminal record and the substantial contributions he had made to the military in service of his country made him stand out. The judge reviewed Lett's service fitness ratings, which ranged from good to excellent and among the best in regard to promotion potential. He summarized the letters he had received and the testimony he had heard as proving that Lett was "an extremely valuable asset to the United States Army, an outstanding NCO, a model soldier, a role model with excellent work ethic, a dynamic, innovative leader, a shining example for his peers and subordinates."

The district court construed the arguments of Lett's counsel as a motion to enter a non-guideline sentence and to determine that the statutory mandatory minimum was constitutionally excessive so that he could sentence below it. The court did not find the mandatory minimum sixty-month sentences constitutionality excessive, but it decided not to sentence any higher than that. The court concluded that Lett's exemplary military service and his lack of

any criminal history, other than during those five weeks he had sold drugs for his cousin, justified a variance under 18 U.S.C. § 3553(a) from the seventy to eighty-seven months range.

However, the court also decided that the statutory five-year mandatory minimum provided a floor beyond which it could not go:

> There is no way that I can legally go below that five-year mandatory minimum, even if I wanted to. So, discretion is limited by Congress, who has dictated that people who commit these kinds of crimes shall serve no less than 60 months, or five years.

The court ordered that the sixty-month sentence on each of the seven counts be served concurrently.

II.

Enter Matthew Sinor, a close friend of Lett's who had served with him in the Army for three years and a second-year student at Moritz College of Law at the time of sentencing. Sinor traveled from Columbus, Ohio to Mobile, Alabama for the proceeding, and when he returned to law school described what had happened to his criminal sentencing professor, Douglas A. Berman. Professor Berman suggested a theory to Sinor which he in turn conveyed to the district court in a letter dated April 17, 2006, four days after the court had sentenced Lett to sixty months imprisonment.

In his letter Sinor informed the court of the professor's view that the safety valve provisions in 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 operated to free the court of the mandatory minimum otherwise

required by 21 U.S.C. § 841(b)(1)(B). Sinor told the court he was concerned that defense counsel had not raised the argument, and that time for doing something about it under Fed. R. Crim. P. 35(a) was running out. Sinor sent copies of his letter to counsel for Lett and the government, but so far as the record shows neither filed a response.

The district court issued an order modifying Lett's sentence on April 24, 2006, which was the last day of the seven-day period for correcting sentences under Rule 35(a), as extended by the counting provision in Fed. R. Crim. P. 45(a)(2). The court explained that at the sentence hearing it had accepted the PSR's recommendation that the safety valve provision did not apply to Lett's sentence because neither Lett nor the government had objected to the PSR, and because the court believed that result was correct. Having reconsidered, the court now decided otherwise.

In setting out the reasons for changing its mind, the court explained in detail how it had interpreted the safety valve provision in § 5C1.2 before the decision in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005):

> It should be noted here that, in the pre-Booker world of sentencing, this Court has consistently denied other Defendants benefit of the safety valve where the guidelines range was calculated to be above the mandatory minimum. The basis for this result is the Court's belief that § 5C1.2 creates two subsets of Defendants; those whose guidelines sentences are above the

mandatory minimum, and those Defendants whose guidelines sentences are below the mandatory minimum. It is this Court's interpretation of that provision that compelled it to conclude that only those Defendants whose guidelines sentences fell below the mandatory minimum were entitled to application of that part of the safety valve which authorizes the Court to impose a sentence below the mandatory minimum. Otherwise, § 5C1.2 makes no sense.

In other words, how could the Court impose a sentence "in accordance with the applicable guidelines without regard to any statutory minimum sentence" if the applicable guidelines range is above the mandatory minimum? Any sentence imposed below the mandatory minimum in such a case necessarily would be outside the applicable guidelines, leaving the Court with no guidelines at all.

Moreover, had Congress and the Sentencing Commission intended that any safety valve-eligible Defendant, regardless of that Defendant's projected guidelines range, be qualified for a lower than mandatory sentence, they could have said so. But Congress and the Sentencing Commission did not say so. In fact, a reasonable interpretation of the [safety valve

> provision] compels a conclusion that the language "in accordance with the applicable guidelines" imposes an additional criterion that a Defendant must meet in order to qualify for a sentence below the mandatory minimum. That is, the Defendant must have a projected guidelines sentence below that minimum.

(emphasis in original; paragraph breaks added).

The court then asked itself: "Now, what does all of this mean in the post-Booker world," and answered its own question with the candid admission that: "The answer certainly is not clear, because there is little or no guidance from the courts of appeal or even from sister courts throughout the country." It found the decisions in United States v. Cherry, 366 F. Supp. 2d 372 (E.D. Va. 2005), and United States v. Duran, 383 F. Supp. 2d 1345 (D. Utah 2005), of little help because they "involved guideline ranges below the mandatory minimum."

Nonetheless, the district court concluded, without further explanation, that in the post-Booker world, "when all five conditions of § 5C1.2 are satisfied, the Defendant is safety valve eligible and the Court's sentencing discretion is not bounded by a statutory mandatory minimum sentence, irrespective of whether the accurately calculated advisory guidelines sentencing range is above or below that mandatory minimum."

With its discretion now unfettered by the five-year mandatory minimum of 21 U.S.C. § 841(b)(1)(B), the district court reapplied the § 3553(a) factors in light of Lett's limited role in the offense, his

voluntary withdrawal from the criminal enterprise followed by his re-enlistment in the Army where he remained on active duty until his arrest, his lack of criminal history, and his unblemished and significant seventeen-year career in the military, including two tours of duty in Iraq. In light of those factors, the court concluded that it should vary downward so that the sentence imposed would be time served, which amounted to eleven days. The court imposed that sentence on all seven counts to run concurrently. As a result, Lett was released from prison subject to a term of supervisory release.

III.

The government appeals the district court's judgment giving Lett a sentence of only eleven days for seven different drug sales over a period of five weeks, totaling just over 60 grams of crack cocaine and just under 8 grams of powder cocaine. The government's contention is that the district court erred in using its Rule 35(a) authority to correct Lett's original five-year sentence, because its initial conclusion that Lett was not safety valve eligible was not an "arithmetical, technical, or other clear error" as required for use of the rule. As a fallback argument, which we need not reach, the government contends that even if the court were permitted to revisit its sentence under Rule 35(a), the resulting eleven day sentence was unreasonable.

Rule 35(a)'s single sentence provides: "Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). The district court did not claim, and Lett does not argue, that the court made an arithmetical or technical

error in imposing the original sentence of sixty months. Instead, the issue is whether the district court's initial decision that the safety valve guideline did not apply to remove the mandatory minimum provision in Lett's case was a "clear error."

The Criminal Rules Advisory Committee explained that what it meant by "clear error" was "acknowledged and obvious errors in sentencing." Fed. R. Crim. P. 35 advisory committee's notes (1991). The committee went on to add:

> The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action . . . . The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. . . .
>
> . . . .
>
> Rule 35(c) provides an efficient and prompt method for correcting obvious technical errors that are called to the court's attention immediately after sentencing.

Id.[1]

We quoted that language in United States v. Yost, 185 F.3d 1178 (11th Cir. 1999), and summarized it as meaning that "the district court may not simply change its mind, and any error to be corrected under that subsection must be obvious." Id. at 1181. We agreed with the district court in Yost that sentencing a defendant under what was obviously the wrong offense level guideline—one applicable to an offense for which the defendant had not been convicted—was clear error within the corrective reach of the rule. Id. at 1179–81.

The Criminal Rules Advisory Committee notes accompanying Rule 35(a) cite two decisions as examples of the kind of error that is clear enough for correction under it. Fed. R. Crim. P. 35 advisory committee's notes (1991). One is United States v. Rico, 902 F.2d 1065 (2d Cir. 1990), where an erroneous statement by the prosecutor and a typographical error in the presentence report had caused the court to impose a sentence different from the one the parties had agreed to in a court-accepted plea agreement. Id. at 1066. The court and both parties acknowledged at re-sentencing that the initial sentence was a mistake. See id. The Second Circuit concluded on appeal that the district court had "properly corrected its illegal sentence." Id. at 1068.

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[1] The provision now located in Rule 35(a) was in Rule 35(c) until it was moved as part of the 2002 amendments to the rule. Id. advisory committee's notes (2002).

The second example the advisory notes give of a proper application of the clear error standard of Rule 35(a) is United States v. Cook, 890 F.2d 672 (4th Cir. 1989). There, the district court initially sentenced the defendant to three months of community confinement followed by three months of supervised release, a sentence contrary to the guidelines and unlawful because supervised release is permitted only after a term of imprisonment. Id. at 674. The Fourth Circuit affirmed the correction of that sentence to a term of three months in prison followed by three months of supervised release. Id. at 674–75. In affirming, the court recognized that the authority of a district court to correct a sentence is narrowly confined, but characterized the case before it as an "unusual" one where the original sentence was "an acknowledged and obvious mistake" and unlawful. Id. at 675.

The Yost, Rico and Cook decisions trace out the boundaries of a narrow corrective power limited in scope to those obvious errors that result in an illegal sentence or that are sufficiently clear that they would, as the committee notes specify, "almost certainly result in a remand of the case to the trial court for further action." Fed. R. Crim. P. 35 advisory committee's notes (1991). In this case the district court did not sentence Lett under the wrong guideline, as in Yost; it did not impose a sentence different from the one in the plea agreement, as in Rico; and it did not impose a sentence that was illegal under the applicable guidelines and statutory provisions, as in Cook.

At most, the district court misunderstood the breadth of its discretion under the safety valve provisions of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2,

read in light of the Booker decision, causing the court to impose a sentence higher than it would have had it correctly gauged the law. Even so, the sentence the court did impose was plainly permissible under the guidelines and applicable statutes. We say "at most," because it is not clear that the district court's initial understanding of the scope of its discretion was mistaken. It is not obvious that the Booker decision eviscerated mandatory minimum sentences in every case where the defendant meets the five criteria for safety valve treatment, including those in which the advisory guideline range is above the mandatory minimum. That result would be the effect of adopting the theory on which the re-sentencing in this case is based.

When the Supreme Court did its remedial work on the sentencing scheme to save the guidelines from constitutional doom, Booker, 543 U.S. at 244–68, 125 S. Ct. at 756–69, it did not address this mandatory minimum, safety valve issue. The issue may be viewed as one of intent, and not just the congressional intent behind 21 U.S.C. § 841(b)(1)(B) and 18 U.S.C. § 3553(f), or the Sentencing Commission's intent behind § 5C1.2 of the guidelines, but also the intent behind the Supreme Court's reconstructive interpretation of the sentencing statutes in the remedial part of the Booker decision. It seems to us that the best approach to the merits of the post-Booker mandatory minimum issue would be to read the statutory and guidelines provisions and the Booker Court's restructuring work together and attempt to ascertain their meaning as though they were all statutory enactments.

We do not have occasion to do that in this case because the merits of the issue are not before us. Instead the issue before us is whether, at the time the district court entered its Rule 35(a) order, it was clear that the court had erred in its earlier conclusion that a sentence below the mandatory minimum was not permissible in the circumstances of this case. We are confident that conclusion was not clear error. Reasonable arguments can be made on both sides of the post Booker mandatory minimum issue, and we have no doubt that they will be. But arguable error is one thing, and clear error is another. Regardless of how this issue is ultimately determined on the merits, the sentence the district court initially imposed was not illegal, and any error was not of an acknowledged and obvious type, the kind that would "almost certainly result in a remand of the case to the trial court for further action." Fed. R. Crim. P. 35 advisory committee's notes (1991).

Indeed, the district court itself conceded that the answer to the post-Booker mandatory minimum question "certainly is not clear," and that there are few if any decisions from other courts that are useful in answering it. We agree with the district court that United States v. Cherry, 366 F. Supp. 2d 372 (E.D. Va. 2005), and United States v. Duran, 383 F. Supp. 2d 1345 (D. Utah 2005), are distinguishable because they involved guideline ranges below the minimum mandatory sentence.

We are not persuaded, as Lett argues, that either United States v. Lopez, 264 F.3d 527 (5th Cir. 2001), or United States v. Poyato, 454 F.3d 1295 (11th Cir. 2006), shows that an obvious error or mistake occurred when he was originally sentenced. Because

Lopez is not binding in this circuit, it would be unlikely to serve as a basis for concluding that any other result would be obvious error and would almost certainly result in vacating the sentence. The Lopez case is also distinguishable, because the applicable guidelines range there ended up being below the mandatory minimum level at the time the safety valve was to be applied. Lopez, 264 F.3d at 530. The Lopez decision did not address whether safety valve relief from a mandatory minimum sentence is available when the guidelines range is above that minimum sentence level.

Nor does our own Poyato decision resolve the matter. It contains wholly unremarkable statements about the post-Booker guidelines being advisory, and about proper sentencing involving applying the guidelines, considering the § 3553(a) factors, and setting a reasonable sentence below the statutory maximum. 454 F.3d at 1299. The actual holding in Poyato was that safety valve relief was properly denied because the defendant failed to meet one of the five prerequisites for it (he had possessed a firearm during the commission of the crime). Id. at 1298–99. Not only that but as in Lopez, the Poyato defendant's advisory guideline range was below the statutory minimum. See id. at 1296. Therefore, Poyato did not present the issue of whether the safety valve can have any application where the guidelines range is above the statutory minimum. See United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000) (per curiam) ("The holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case which produced the decision." (quotation marks and citation omitted)). For that reason any statements touching on this

issue would be no more than dicta anyway. See Aron v. United States, 291 F.3d 708, 716 (11th Cir. 2002) (Carnes, J., concurring) ("All that is said which is not necessary to the decision of an appeal given the facts and circumstances of the case is dicta.").

At oral argument, Lett's present counsel (who did not represent him in the district court) invited us to import into the Rule 35(a) "clear error" measure the plain error standard of Rule 52(b), as interpreted and applied in countless decisions. The invitation is logically appealing because the narrow purpose of Rule 35(a) dovetails nicely with the scope of the plain error rule. Before an error is subject to correction under the plain error rule, it must be plain under controlling precedent or in view of the unequivocally clear words of a statute or rule; it must have adversely affected the outcome of the proceedings; and it must be such that the failure to correct it would seriously affect the fairness, integrity or public reputation of judicial proceedings. United States v. Olano, 507 U.S. 725, 732–37, 113 S. Ct. 1770, 1776–79 (1993); United States v. Rodriguez, 398 F.3d 1291, 1298 (11th Cir. 2005). If an error meets all those requirements, it is also the kind of obvious error that "would almost certainly result in a remand of the case to the trial court for further action" and would therefore come within the narrow scope of Rule 35(a). Fed. R. Crim. P. advisory committee's notes (1991). As a margin note here, we point out that the Supreme Court has described the plain error rule with language that sounds like the Rule 35(a) "clear error" standard. In the Olano opinion, for example, the Court said that the "plain" in plain error "is synonymous with 'clear' or, equivalently, 'obvious.'" 507 U.S. at 734, 113 S. Ct. at 1777.

All this may be well and good, but it does not help Lett. For the same reasons that the district court's view of the mandatory minimum requirements in light of the safety valve provisions is not an obvious error or mistake that almost certainly would have caused the sentence to be overturned on appeal, it is not plain error. See United States v. Castro, 455 F.3d 1249, 1253 (11th Cir. 2006); United States v. Lejarde-Rada, 319 F.3d 1288, 1291 (11th Cir. 2003); United States v. Humphrey, 164 F.3d 585, 588 (11th Cir. 1999).

IV.

We agree with the district court's recognition that the proper resolution of the mandatory minimum and safety valve issue that prompted its Rule 35(a) modification of Lett's sentence is not clear. There is no decision on point from any court, and reasonable people could differ about the matter. That means the court's initial understanding was not "an obvious error or mistake . . . which would almost certainly result in a remand" if not corrected, which is the proper standard of clarity under the rule. Fed. R. Crim. P. 35(a) advisory committee's notes (1991). The district court used Rule 35(a) to take another stab at interpreting the applicable statutory and guideline provisions in light of the Booker decision, and the committee notes forbid use of the rule for that purpose. Id. (The rule "is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines.").

We do not question the district court's good faith in attempting to work its way through the problem, and we are not unsympathetic to its desire to give Lett a sentence less than the mandatory minimum.

Our review, however, is de novo, and our reading of Rule 35(a) requires that we vacate the court's order re-sentencing Lett and remand the case with instructions that it impose the original sentence of sixty months to run concurrently on each count.

JUDGMENT VACATED AND REMANDED WITH INSTRUCTIONS.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA

VS.

PATRICK LETT

CRIMINAL NO. 05-00266-WS

ORDER AMENDING SENTENCE

On April 13, 2006, Defendant Patrick Lett appeared before the undersigned for a sentencing hearing. At the conclusion of the hearing, following consideration of the testimony presented, argument of counsel, and consideration of the information contained in the Pre-Sentence Report (PSR), the Court sentenced Defendant to a term of imprisonment for 60 months concurrent in each of the seven counts of the indictment to which Defendant entered a plea of guilty. As stated on the record during the hearing, the term of 60 months was chosen because that term represents the mandatory minimum sentence prescribed by Congress in 21 U.S.C. § 841(b)(1)(B), the statute violated by Defendant as charged in counts 8-12 of his indictment. Pursuant to Fed.R.Crim.P. 35(a) and for the reasons set forth below, the Court now *sua sponte* reconsiders the sentence imposed.

At issue in this Court's reconsideration of Defendant's sentence, is the application of U.S.S.G. § 5C1.2 ("the safety valve") and the effect of that provision on Defendant's sentence given his somewhat unique circumstances. Perhaps the

appropriate starting point in this discussion is with the PSR and by noting that neither the Defendant nor the Government filed any objection to the contents of the PSR prior to the sentencing hearing. As a result, this Court adopted the PSR and determined that the sentencing guidelines calculations contained therein were accurate. See *United States v. Moriarty*, 429 F.3d 1012, 1021 (11th Cir. 2005) (holding that "even in the post-Booker era, district courts still have the obligation to calculate the applicable Guidelines range accurately."). The PSR advised, and the Court found, again without objection, that Defendant qualified for consideration of the safety valve because Defendant met all of the criteria found in § 5C1.2. Therefore, included in the Court's calculation of the Defendant's offense level was a two-level reduction as allowed pursuant to § 2D1.1(b)(1) of the Sentencing Guidelines. (PSR, paragraph 40). Taking into account all of the factors required for an accurate calculation of the Guidelines, the Court determined that Defendant possessed a total offense level of 27,[1] with a criminal history category of I, producing a Guidelines range of imprisonment of 70 to 87 months. The effect of that range of punishment on the application of the safety valve is addressed in paragraph 76 of the PSR which states as follows:

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[1] Because Defendant admitted that he possessed with intent to distribute 60.42 grams of crack cocaine and 7.89 grams of powder cocaine, his base offense level started at level 32. (PSR, paragraph 38). After applying all appropriate adjustments, his total offense level resulted in a level 27.

> Counts 8, 9, 10, 11, and 12, each carry a mandatory minimum penalty of 60 months. Although it appears that the defendant is eligible for consideration under U.S.S.G. § 5C1.2, because the minimum of the guideline range is 70 months, which is greater than the statutory mandatory minimum 60 months, 5C1.2 consideration is a moot issue.

As noted above, there was no pre-hearing objection to this provision in the PSR. Nor did Defendant object to the Court's adoption of this provision.

The Court, mindful of the Eleventh Circuit's directive that the sentencing court is obligated to accurately calculate the Guidelines, and mindful of the language of § 5C1.2 which provides that "the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence," reasoned that because of Defendant's circumstances, an accurate calculation of the Guidelines produced a result which denied him the benefit of the safety valve.

It should be noted here that, in the pre-*Booker* world of sentencing, this Court has consistently denied other Defendants benefit of the safety valve where the guidelines range was calculated to be above the mandatory minimum. The basis for this result is the Court's belief that § 5C1.2 creates two subsets of Defendants; those whose guidelines sentences are above the mandatory minimum, and those Defendants whose guidelines sentences are below the mandatory minimum. It is this Court's interpretation of that provision that compelled it to

conclude that only those Defendants whose guidelines sentences fell below the mandatory minimum were entitled to application of that part of the safety valve which authorizes the Court to impose a sentence below the mandatory minimum. Otherwise, § 5C1.2 makes no sense. In other words, how could the Court impose a sentence "in accordance with the applicable guidelines without regard to any statutory minimum sentence" if the applicable guidelines range is above the mandatory minimum? Any sentence imposed below the mandatory minimum in such a case necessarily would be outside the applicable guidelines, leaving the Court with no guidelines at all. Moreover, had Congress and the Sentencing Commission intended that any safety valve-eligible Defendant, regardless of that Defendant's projected guidelines sentence range, be qualified for a lower than mandatory minimum sentence, they could have said so. But Congress and the Sentencing Commission did not say so. In fact, a reasonable interpretation of § 5C1.2 compels a conclusion that the language "in accordance with the applicable guidelines" imposes an additional criterion that a Defendant must meet in order to qualify for a sentence below the mandatory minimum. That is, the Defendant must have a projected guidelines sentence below that minimum.

Now, what does all of this mean in the post-*Booker* world? The answer certainly is not clear, because there is little or no guidance from the courts of appeal or even from sister courts throughout the country. Those courts who have addressed the application of the safety valve in the post-*Booker* environment appear not to have had factual

circumstances similar to the case at hand. *See e.g., United States v. Cherry*, 366 F.Supp.2d 372 (E.D. Va. 2005), *United States v. Duran*, 383 F.Supp.2d 1345 (D.Utah 2005). Both *Cherry* and *Duran* involved guidelines ranges below the mandatory minimum.

In the pre-Booker mandatory guidelines world, given the facts of this case, and given this Court's practice with regard to the application of the safety valve, it is clear that Defendant Lett would have received a sentence in the range of 70 to 87 months. In the post-*Booker* advisory guidelines world, what now are the options available to this Court where, as here, the Defendant satisfies all five conditions of § 5C1.2? The Court concludes, assuming that sentencing factors justify, this Court could exercise its discretion in imposing a non-guidelines (variance) sentence above the guidelines range, a sentence within the guidelines range, a sentence below the guidelines range but no lower than the mandatory minimum, or a sentence below the guidelines range and below the mandatory minimum.

In Defendant Lett's case, the Court determined and found during the sentencing hearing that other sentencing factors contained in 18 U.S.C. § 3553(a) compelled a conclusion that Defendant Lett was entitled to a non-guidelines sentence (variance). Those reasons were substantially stated on the record and will not be repeated here. However, because the Court found that an accurate calculation of the Guidelines produced a sentencing range above the mandatory minimum, and because of the Court's interpretation of the provisions of § 5C1.2, the Court reasoned that the limit of the Court's discretion in sentencing was bounded by the statutory mandatory

minimum of 60 months. As stated on the record, and for the reasons given, the Court exercised what it believed to be its limited discretion and set Defendant Lett's sentence at 60 months. The Court now concludes that, in this post-*Booker* era, its interpretation of § 5C1.2 is overly restrictive and Defendant Lett is entitled to be re-sentenced.

As stated on the record during the sentencing hearing, this Court found that, after applying the appropriate sentencing factors found in 18 U.S.C. 3553(a), Defendant was entitled to a non-guidelines (variance) sentence. Now, having reconsidered application of the safety valve provisions, in light of the now advisory guidelines scheme, this Court finds that its discretion in sentencing is not limited as previously believed and as discussed above. Stated differently, the Court finds that when all five conditions of § 5C1.2 are satisfied, the Defendant is safety valve eligible and the Court's sentencing discretion is not bounded by a statutory mandatory minimum sentence, irrespective of whether the accurately calculated advisory guidelines sentencing range is above or below that mandatory minimum. The Court's statements to the contrary at the sentencing hearing were error. Given all of the sentencing factors discussed on the record during the sentencing hearing which include Defendant's limited role in the offense which, for his part, extended over a period of little more than a month, Defendant's voluntary withdrawal from that criminal enterprise followed by his re-enlistment in the U.S. Army where he remained on active duty until the time of his arrest on the present charges on October 17, 2005, Defendant's lack of criminal history, and Defendant's unblemished and significant 17 year career in the

U.S. Army including two tours of duty in Iraq, this Court exercises its discretion to re-sentence Defendant as follows:

Pursuant to the Sentencing Reform Act of 1984, and upon consideration of all of the sentencing factors found in 18 U.S.C. § 3553(a) as articulated on the record during the original sentencing hearing, and in light of the matters discussed above, it is the judgment of the Court that Defendant, Patrick Lett, is hereby sentenced to the time he has now served in the custody of the United States Bureau of Prisons. That sentence is imposed as to each of counts 5, 7, 8, 9, 10, 11, and 12, and said terms are considered to have been served concurrently.

Upon release from imprisonment pursuant to this order, Defendant shall be placed on supervised release for a term of three years on each of counts 5 and 7, and 5 years on counts 8, 9, 10, 11, and 12, all such terms to run concurrently. Defendant shall abide by the terms and conditions of supervised release as previously imposed during the sentencing hearing on April 13, 2006. Within 72 hours of release from custody, Defendant shall report in person to the Probation Office in the Southern District of Alabama.

The Court finds that the sentence imposed addresses the seriousness of the offense, and a sentencing objectives of punishment, deterrent, and incapacitation, and constitutes a reasonable sentence following consideration of the sentencing factors found in 18 U.S.C. 3553(a).

All of the other terms, conditions, and orders entered during the sentencing hearing remain in effect.

DONE and **ORDERED** this 24th day of April, 2006.

s/WILLIAM H. STEELE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA
V.
PATRICK LETT

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On Or After November 1, 1987)

CASE NUMBER: 1:05-CR-00266-003-WS
USM NUMBER: 09226-003

THE DEFENDANT: Glenn Gerard Cortello

Defendant's Attorney

(X) pleaded guilty to count(s) Five, Seven, Eight, Nine, Ten, Eleven and Twelve of the Indictment.

( ) pleaded nolo contendere to count(s) which was accepted by the court.

( ) was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Date Offense Count

Title & Section/Nature of Offense/Date Offense Concluded/Count No.(s)

21:841(a)(1): possession with intent to distribute crack cocaine; 2/24/2004 ; five counts.

21:841(a)(1): possession with intent to distribute crack cocaine; 3/1/04; seven counts.

21:841(a)(1): possession with intent to distribute Cocaine; 3/3/04; eight counts.

21:841(a)(1): possession with intent to distribute Cocaine; 3/10/04; nine counts.

21:841(a)(1): possession with intent to distribute crack cocaine; 3/17/04; ten counts.

21:841(a)(1): possession with intent to distribute crack cocaine; 3/24/04; eleven counts.

21:841(a)(1): possession with intent to distribute crack cocaine; 4/1/04; twelve counts.

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) .

(X) **Count(s) One is dismissed on the motion of the United States.**

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

April 13, 2006
Date of Imposition of Judgment

s/WILLIAM H. STEELE
UNITED STATES DISTRICT

JUDGE
April 24, 2006
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total **term** of **TIME SERVED as to each of Counts Five, Seven, Eight, Nine, Ten, Eleven and Twelve and said terms are considered to have been served concurrently.**

() Special Conditions:

() The court makes the following recommendations to the Bureau of Prisons:

(X) The defendant is remanded to the custody of the United States Marshal.

() The defendant shall surrender to the United States Marshal for this district:

() at a.m./p.m. on .

() as notified by the United States Marshal.

() The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

() before 2 p.m. on .

() as notified by the United States Marshal.

() as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By_____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE (3) YEARS as to each of Counts Five and Seven; and FIVE (5) YEARS as to each of Counts Eight, Nine, Ten, Eleven and Twelve; said terms to run concurrently, for a total supervised release term of FIVE (5) YEARS**.

(X) Special Conditions: **the defendant shall participate in a program of testing and treatment for drug and/or alcohol abuse as directed by the Probation Office.**

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at

least two periodic drug tests thereafter, as directed by the probation officer.

() The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

() The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable)

() The defendant shall participate in an approved program for domestic violence. (Check, if applicable)

(X) **The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall comply with the standard conditions that have been adopted by this court

(Probation Form 7a).

The defendant shall also comply with the additional conditions on the attached page (if applicable).

See Page 4 for the "STANDARD CONDITIONS OF SUPERVISION"

SUPERVISED RELEASE

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall cooperate, as directed by the probation officer, in the collection of DNA, if applicable, under the provisions of 18 U.S.C. §§ 3563(a)(9) and 3583(d) for those defendants convicted of qualifying offenses.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Assessment/Restitution

Totals: $700.00; $100.00 as to each of Counts Five, Seven, Eight, Nine, Ten, Eleven and Twelve

() The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such a determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. **(or see attached)** However, pursuant to 18 U.S.C. § 3644(i), all non-federal victims must be paid in full prior to the United States receiving payment.

() The defendant shall make restitution to the following payees in the amounts listed below.

Name(s) and Address(es) of Payee(s)/Total Amount of Loss/Amount of Restitution Ordered/Priority Order or % of Payment

TOTALS: $_____ $_____

() If applicable, restitution amount ordered pursuant to plea agreement. $

() The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default, pursuant to 18 U.S.C. § 3612(g).

() The court determined that the defendant does not have the ability to pay interest and it is ordered that:

() The interest requirement is waived for the () fine and/or () restitution.

() The interest requirement for the () fine and/or () restitution is modified as follows:

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A (X) Lump sum payment of **$ 700.00** due immediately, balance due () not later than , or () in accordance with () C, () D, () E or () F below; or

B () Payment to begin immediately (may be combined with () C, () D, () E or () F below); or

C () Payment in (e.g., equal, weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D () Payment in (e.g., equal, weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E () Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the

payment plan based on an assessment of the defendant's ability to ay at that time; or

F () Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

() Joint and Several:

() The defendant shall pay the cost of prosecution.

() The defendant shall pay the following court cost(s):

() The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest, (4) fine principal; (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

* *

UNITED STATES OF AMERICA ,

VS.

PATRICK LETT

Defendant.

* *

Criminal No.: 05-0266-WS
April 13, 2006
Courtroom 2A
U.S. Federal Courthouse
Mobile, Alabama

SENTENCING HEARING
BEFORE THE HON. WILLIAM H. STEELE
UNITED STATES DISTRICT JUDGE
APPEARANCES

For The Government: John G. Cherry, Jr., Esq.
Assistant U.S. Attorney
U.S. Attorney's Office
63 S. Royal Street
Suite 600
Mobile, Alabama 36602

For The Defendant:	Glenn G. Cortello, Esq. Attorney at Law 711 Washington Street Alexandria, LA 71301
Court Reporter:	Mary Frances Giattina, RDR/CRR Official Court Reporter P. O. Box 3021 Mobile, AL 36652-3021 (251) 690-3003

Proceedings reported by machine stenography.

Transcript produced by computer.

MARY FRANCES GIATTINA, RDR, CRR, OFFICIAL COURT REPORTER P. O. BOX 3021, MOBILE, ALABAMA 36652 (251) 690-3003

(April 13, 2006, 2:10 p.m.) (In open court.)

(Defendant present with counsel.)

THE COURT: Good afternoon.

MR. CHERRY: Good afternoon.

MR. CORTELLO: Good afternoon, Judge.

THE CLERK: We're here for a sentencing in the case of United States versus Patrick Lett, Criminal Case Number 05-266. What says the Government?

MR. CHERRY: The United States is ready, Your Honor.

THE CLERK: And what says the Defendant?

MR. CORTELLO: Defendant is ready.

THE COURT: All right. Come on up, please. Let me get you to come forward, if you would, please, sir.

(Brief pause.)

THE COURT: Sgt. Lett, let me get you to stand right here in front of the microphone. If you would raise your right hand and take an oath -- this microphone right there on the table.

(The Defendant was placed under oath.)

THE COURT: All right. Would you state your name for the record, please.

DEFENDANT: Patrick O'Neal Lett.

THE COURT: All right. We're here today for a sentencing hearing following entry of a guilty plea on December 30, 2005, to Counts Five, Seven, Eight, Nine, 10, 11, and 12 of an indictment charging possession with intent to distribute cocaine and

crack cocaine. The plea was entered subject to a written plea agreement.

The Presentence Report has been published in this case, and Mr. Cortello, I would assume that you received a copy of it and had a chance to discuss it with Mr. Lett?

MR. CORTELLO: Yes, sir, I did. And we have no objection to it.

THE COURT: All right. And Sgt. Lett, do you understand what's contained in the Presentence Report?

DEFENDANT: Yes, sir, Your Honor.

THE COURT: I note that there are no written objections filed to the Presentence Report. Does anyone have anything to offer with regard to the contents of the report at this time?

MR. CORTELLO: No, sir.

MR. CHERRY: No, sir.

THE COURT: Mr. Cherry? All right. Then the Court will adopt the Presentence Report as published, reflecting a base offense level of 32. There's a two-level reduction for application of the safety valve, a three-level reduction for acceptance of responsibility, producing an adjusted offense level of 27.

Sgt. Lett has zero criminal history points, placing him in a Criminal History Category I, and that generates a guideline range of 70 to 87 months.

Is that everyone's understanding of the application of the Guidelines?

MR. CORTELLO: Yes, Your Honor.

MR. CHERRY: Yes, sir, Your Honor.

THE COURT: All right. Mr. Cortello, do you want to be heard on Sgt. Lett's behalf at this time?

MR. CORTELLO: Yes, sir. At this time, I would call Capt. Michael Iannuccilli. And his last name is I-a-n-n-u-c-c-i-l-l-i.

THE COURT: Come on up, Captain, if you would. Good afternoon.

CAPT. IANNUCCILLI: Afternoon, sir.

THE COURT: All right. Do you want to ask questions or you just have a statement to make?

MR. CORTELLO: I can go ahead and let him speak from his heart.

THE COURT: All right.

CAPT. IANNUCCILLI: Sir, first of all, I also brought my First Sergeant, Sgt. Lett's platoon sergeant, and another senior NCO from my company, none of which are in uniform today.

I want everyone in the courtroom to understand that I'm not here representing the military. I have no basis to speak on behalf of the United States Army. I'm here as his commander, and the other representatives here are to speak on their behalfs -- or on his behalf in their respective positions.

Sir, I've known Sgt. Lett for 12 months, four days. I met him the day I deployed from Afghanistan on a one-year tour. I found myself in direct responsibility of Sgt. Lett. He immediately proved to be an outstanding NCO and soldier, never failed to impress me with his motivation and dedication to the mission.

I was his direct supervisor for roughly four months, at which time I found out I would take

command of the unit. He immediately began giving me advice from the NCO's perspective on what soldiers need. I found his advice invaluable to me over the past nine months in command.

While under my direct supervision, he was always the first one into our office and the last one out, never leaving until the mission was complete, regardless of how late he was there.

During our time over the past 12 months, he has taken troubled soldiers under his wing, given them advice and tried to steer them in the right direction, talked with soldiers who had received administrative punishment under my command about how to get themselves on the right track, make amends with what they've done and correct their ways.

MR. CORTELLO: Did he mentor any of your soldiers?

CAPT. IANNUCCILLI: Yes, he did. As I said, he was consistently on the lookout for soldiers who were heading down the wrong path and gathering them up and trying to push them into the right direction.

I know Sgt. Lett to be a patriot, father, and a good man, and I know that those are his three primary motivators in life. I've talked to him to lesser or greater degrees on all those aspects. I can say that of the 31 NCO's in the rank of sergeant that I -- that I currently command, he is in the top ten percent of those NCO's.

He displays daily the Army values. For those of you unfamiliar, they spell out the acronym leadership. It's loyalty, duty, respect, selfless service,

honor, integrity, personal courage. Often, it's thought f as a tag line in the military, and it's not taken as seriously as it should be. Under the 12 months I've known Sgt. Lett, he has exemplified the Army values.

Sir, I have limited knowledge on the charges he is – he has pled guilty to. I understand them in the context of what Mr. Cortello has shown me. I don't understand the circumstances under which they occurred. I'm not here to talk about that today. I'm here as a character witness for Sgt. Lett.

I could not be happier with his performance in my company. I would gladly deploy to Iraq with him and entrust my life to him. I'd trust my soldiers' lives to him. He's been nothing but an exemplary soldier for the past 12 months.

Sir, I implore you to reduce the sentence to as light as you possibly can. He continues to be a patriot to serve his nation, and he's expressed to me that is his sole desire is to continue on as a soldier in the United States Army. That's all I have, sir.

THE COURT: All right. Mr. Cherry, do you have any questions of the Captain?

MR. CHERRY: No, sir.

THE COURT: All right. Thank you, Captain.

CAPT. IANNUCCILLI: Yes, sir.

MR. CORTELLO: First Sgt. Daniel Sheward. And his last name is S-h-e-w-a-r-d.

THE COURT: Good afternoon.

FIRST SGT. SHEWARD: Good afternoon, sir. Sir, I'd like to say today that Sgt. Lett is an excellent soldier and a role model for all the noncommissioned officers and other soldiers in the unit. I've worked

directly with Sgt. Lett over the past eight months, and at which time we picked Sgt. Lett to do a job in the unit which is -- works directly for the commander as a unit supply sergeant. He was picked over by 30 other soldiers, and it is probably one of the most important jobs in the unit, sir, and which he doesn't – that isn't his correct MOS, but he took that job because of his leadership abilities.

While working with Sgt. Lett, he has demonstrated all the Army values, as the Captain already said. I've known on many occasions where a soldier has been knocked down for whatever reason, done something wrong, and as soon as I look away and I look back over, Sgt. Lett is over there picking that soldier up and trying to lead him to try to do the right thing, sir.

He has demonstrated an excellent work ethic in putting in numerous hours before and after. Even if it's something that I don't task Sgt. Lett with, if he has a knowledge of it, he'll stay there until that mission is accomplished. And usually, he'll call me late hours of the night when it's done to let me know that it's finished.

As a First Sergeant, I sleep well at night knowing that Sgt. Lett is on the mission because I know that no matter what the cost, he will get the mission accomplished. If every soldier in the military was like Sgt. Lett, it would be a better place.

And Your Honor, Sgt. Lett is an excellent soldier who would best serve his fellow man and his country by continuing with the United States Army. Sgt. Lett has admitted his guilt, and I just ask you to think of him needing us and us needing him.

Thank you, sir.

THE COURT: Mr. Cherry, any questions?

MR. CHERRY: No, sir.

THE COURT: Okay. Thank you.

MR. CORTELLO: Sgt. Tamisha Daggs, D-a-g-g-s. The first name is Tamisha, T-a-m-i-s-h-a.

THE COURT: Good afternoon.

SGT. DAGGS: Good afternoon. Sir, I'm here to Speak on Sgt. Lett's behalf. Sgt. Lett is an outstanding soldier. He's hard-working and dedicated. His hard work and dedication has motivated many soldiers to strive for excellence.

Sgt. Lett is -- he has the ability to accept his mistakes and mentor others and keep them from making that same mistake. He's a vital asset not only to my company but to the United States Army, sir.

Sgt. Lett makes my job a lot easier. When we get young soldiers in, he mentors them not only with the military life but how to adapt to a way of life. He's an outstanding soldier, sir.

MR. CORTELLO: Thank you.

THE COURT: Thank you.

MR. CORTELLO: Sgt. Lett, would you like to allocute at this time, make a statement to the Court?

DEFENDANT: Yes. Your Honor, I'm here today to ask you to give me an opportunity to continue serving this country. I came from -- I went to Iraq in 2003, April of 2003. I had less than three days left in the military before I deployed to Iraq. My country called upon me to go to Iraq with three days left in the military, and I didn't refuse.

During my time in Iraq, I went through some changes. I saw a lot of things. And I've seen a lot of things in two wars, but this war, I saw some very, very strange things that happened. I lost some friends, several friends, and I seen several comrades get killed.

I came home on December the 20th. I got out of the military December the 20th, and I made it home January the 22nd. During the time I got home, there was a lot of issues I had to deal with. Yes, the military offered counseling to soldiers who have been to war, but at the time, I was just ready to get home and see my kids and my family. I lost my dad -- at the time, my dad was dying. I lost my fiancee. I was dealing with the issues of my kids, trying to see how can I provide for my kids and to be a good father. I started drinking real heavy during that time, and I just felt like the lowest person on the face of the earth.

At the time, there was a mistake made, Your Honor. And that mistake was made, and I accept responsibility for that mistake. But the pressure that was upon me, I don't think anyone can fathom that because it's me, it was my emotions that I was dealing with internally.

After the mistake was made, I realized that it takes a cruel-hearted person to actually take advantage of someone who has a disease, and that disease is addiction. My 17 years, I decided to get on my knees and pray a little harder and ask God to pull me back together, in which he did. I wrote to my congressman and asked him to assist me in getting back into the military. At that time, I rejoined the military.

This offense occurred over two years ago. It happened for a short period of time, but the remainder of the time that I was home, I was doing what's right this time to be a good father and taking care of my dad and my kids and my mother.

My mother is -- my mom is 54 years old. My daughter is 16 and pregnant. I have a 13-year-old daughter, and I have a six-year old daughter, and my family depends on my income. That's why I rejoined the military, not to run away from anything, because when I put this uniform on, it's with pride and respect and unity and honor and knowing that I'm serving this country. That's why I've been in the military for 17 years, Your Honor.

I'm asking you as a man with kids, my mother will not be able to take care of my daughter who is pregnant right now. There is no way possible. She's a good mom, and she's there for my kids. She gets a large portion of my money from the military each month.

I apologize to -- I've asked God numerous occasions, numerous occasions to forgive me. And in my heart I know He has, because we all make mistakes. That's the point of learning from your mistakes. And when you can learn from your mistakes, it makes you a better person.

I was placed in this position because of my desperation for something. I wasn't out there trying to be some big-time drug dealer. Ain't no way, Your Honor. That's not my lifestyle. That's not what my life is about, never has been.

After 17 -- after being away from home for seven months and coming home, I found like someone saw me in a desperate situation and took advantage

of me. That's how I look at being put in that position. But I was man enough to walk away from it and go back into the military, in which I've been back in the military now for 17 months, and I haven't made any mistakes at all, Your Honor.

MR. CORTELLO: How long have you been in the military overall?

DEFENDANT: I've been in the military for 17 years, 17 years. I've been in Desert Storm and I went to Iraq, Iraqi Freedom. I'm asking Your Honor to let me try to continue my career and to take care of my family. That's the most important thing is taking care of my mom and my kids and serving this country.

THE COURT: All right.

MR. CORTELLO: Would you answer any questions the Prosecutor has for you, please?

THE COURT: Mr. Cherry, do you have anything?

MR. CHERRY: If I could, just a couple, Your Honor.

THE COURT: Sure.

EXAMINATION

BY MR. CHERRY:

Q. Sgt. Lett, you said someone took advantage of you when you came home?

A. I feel like I was put in a position to be taken advantage of, Mr. Cherry.

Q. Who did that?

A. Michael Lett, sir.

Q. Mike Lett?

A. Yes, sir.

Q. And how did he do that to you?

A. I had a truck, a Jeep.

Q. I'm sorry?

A. I had a Jeep truck that the transmission had broke. And at the time, I had borrowed some money from Michael. And he asked me -- seven years away, I don't know anything about on how to deal with stuff like that. And he asked me to deliver a package, or pass a package off to him.

Q. He asked you to deliver a package or packages?

A. To pass it off, basically, sir.

Q. Okay. Now, you pled guilty to seven counts of dealing crack cocaine to undercover officers, right?

A. Yes, sir.

Q. And was Michael Lett with you on any of those occasions making you do that?

A. No, sir.

Q. What is your MOS, your military occupational specialty?

A. I'm a 92 Alfa, sir.

Q. You're in supply?

A. Yes, sir.

Q. And that's what you do right now?

A. I'm working at -- I was working in the motor pool, but I'm working right now as a 92 Yankee, sir.

Q. All right. And what were you doing in Iraq?

A. I was a 92 Alfa in 19 F scout company, sir.

Q. Whereabouts?

A. In Baghdad.

Q. In Baghdad? You were on a base?

A. We was at -- the first base we was at was Saddam War College. Then we moved from there to a place called the Teardrop, and we moved from there down into central Baghdad. And that's where we went to from there into the Palace.

Q. Saddam's Palace outside by the airport?

A. It's not too far from the airport, sir.

Q. Okay. That's a walled compound, isn't it?

A. That area is once you go in, but the missions are outside the compound, sir. I know it seems like what is 92 Alfa doing out on missions, but when you're in the service now, the Army is basically about every soldier being prepared for war.

Q. So, on February 24th, 2004, when you sold to the undercover officer, it was you selling, it wasn't Michael, Michael wasn't with you, was he?

A. (No audible response.)

Q. Let me ask you this: On these occasions, Mike wasn't standing there telling you you had to do this, was he?

A. No, sir.

MR. CHERRY: That's all I have, Your Honor.

THE COURT: Mr. Cortello, anything further?

MR. CORTELLO: Judge, I would just -- I have nothing further. I just had a comment I wanted to make, that obviously he has pulled himself up by his bootstraps and straightened his life out.

The month of March, 2004, April the 1st -- well, actually, it was from February 24th was the first offense to April the 1st of '04 was the last offense. He

was actually on the ground here in Alabama because he had gotten out of the military in December. So, he was on the ground until October.

But after April -- and of course, that investigation continued on, but he did pull himself up by the bootstraps, decided not to do that, realized that he had, that he had a little gem there, having been in the service for so long, and went back in to help his family obligations and straighten his life out. And he's done an exemplary job of being in the United States Army since then.

He has asked me, and I realize that there's a minimum mandatory five-year sentence under the statute, and it would be very hard for the Court to find a five-year sentence that's constitutionally excessive, but he has asked that I ask you to put him on supervised release or some kind of probation with the hopes of him staying in the military. But I realize how hard that is to do, so I would ask the Court to give the minimum sentence possible.

THE COURT: Mr. Cherry, comments, argument?

MR. CHERRY: Your Honor, I too was in Iraq. We ran convoys up into Fallujah, Anaconda, Mosul. I too lost soldiers. I've sat in the back of airplanes in a cargo plane sitting beside a flag-draped coffin at 2:00 in the morning coming back with one of ours.

I didn't come back and sell drugs. It's no excuse. We got him on seven occasions. I don't know what else he might have sold. But I ask the Court to abide by the advisory guidelines.

MR. CORTELLO: Judge, I would just point out that he was mentoring soldiers to stay out of trouble

before he knew that -- before he ever knew that he was going to be arrested for these charges. That's all, Judge. Thank you.

THE COURT: All right. What I have before me, of course, is the decision to either apply the Guidelines which, as I've already announced, produce sentencing guideline range of 70 to 87 months, or I have what I perceive to be a motion to enter a non-guideline sentence. And then there is, I guess, an additional motion to determine that the mandatory minimum in this case is constitutionally excessive and to even go below the mandatory minimum.

In trying to fashion a reasonable sentence in this case, there are a lot of things that I have to consider. I have to consider, first of all, the application of the Guidelines and whether or not that sentence as now determined to be an advisory sentence produces a reasonable result.

I have to look at all of the information and all the factors that are available to me and required under Section 3553(a). And there are a number of factors that I have to consider, and some of which are the nature and circumstances of the offense.

Well, what we have here is not only one offense but we have seven separate counts of an indictment in which Sgt. Lett is charged with selling crack cocaine or powder cocaine to an undercover agent not once but on seven different occasions. And the quantity of the total amount of cocaine and crack cocaine under the Guidelines and as determined under the statute produce a sentence, as I said, of 70 to 87 months.

The statutory punishment available under Counts Five and Seven are up to 20 years, and

Counts Eight, Nine, 10, 11, and 12 carry punishment of five to 40 years. So, there's a mandatory minimum in this case of five years. That's the minimum sentence that could be imposed. Five years is theminimum sentence that could be imposed, and that's been directed by Congress.

The Sentencing Guidelines, as I indicated, produce a sentence higher than the mandatory minimum. So, any reduction under 70 months would require either a departure, which I don't have a motion for before me, or application of a non-guideline sentence.

So, again, considering the nature and circumstances of the offense, I've got an offense that Congress has determined to be serious. And the evidence in this case is strong. I don't think there's any question about it. These are undercover buys not to someone working for the Government as cooperating witness, but this is to a Federal agent.

However, I'm also supposed to consider the history and characteristics of the Defendant in combination with the nature and circumstances of the offense. And then once I consider those two factors, then I have to impose a sentence that reflects the seriousness of the offense, that will promote respect for the law, provide just punishment, afford adequate deterrence, protect the public from further crimes, and to provide the Defendant with the necessary correctional treatment in the most effective manner.

What I've got is a very unusual set of circumstances here. I don't normally see people standing before me in uniform. What I normally see are individuals who stand before me with significant

criminal histories, with little or no productivity to stand on in their lives, generally uneducated, unemployed, and individuals who have been in trouble with the law time and time again.

That's not the case with Sgt. Lett. I have someone who has a military career behind him, who since the advent of the offenses in February and March of 2004 has re-entered the military. And based on everything that I've seen in terms of the letters of recommendation and heard today from Sgt. Lett's Captain and First Sergeant and fellow soldier, there's every reason to believe that Sgt. Lett's contributions to the Army and to the military and, in turn, to this country have been substantial not only in terms of serving in time of war but serving in times of peace and serving, serving well.

And I note from the letters that I received that – which pretty much confirm what I heard today, that he's -- Sgt. Lett has been described as an extremely valuable asset to the United States Army, an outstanding NCO, a model soldier, a role model with excellent work ethic, a dynamic, innovative leader, a shining example for his peers and subordinates.

And in reviewing the fitness reports that I have available to me, his ratings have been good to excellent. And in the category of potential for promotion and to service in positions of greater responsibility, he was rated among the best.

There's little doubt that based on my military experience that a good NCO is of extreme value to the Army. So, I think Sgt. Lett is to be credited for his contributions to the United States Army, to his unit and, in turn, to this country.

The other factor that I can consider would be how his criminal conduct stands in relation to what has otherwise been an exemplary life up until the time of the offenses and even after. And it appears to me that the five or six weeks in 2004 in which Sgt. Lett chose to violate the law, and violate it in a very serious way, indicates what would otherwise be determined to be aberrant behavior. It was not typical of his training, apparently his upbringing and, for whatever reason, Sgt. Lett chose to violate the law during that period of time.

All of that said, and having considered all of that, it is my decision that a non-guideline sentence is appropriate under all the facts and circumstances. However, my discretion is limited by Congress, and my discretion is limited to the mandatory minimum in this case, which is five years. There is no way that I can legally go below that five-year mandatory minimum, even if I wanted to. So, discretion is limited by Congress, who has dictated that people who commit these kind of crimes shall serve no less than 60 months, or five years.

That being the case, pursuant to the Sentencing Reform Act of 1984, it's the judgment of this Court that you, Patrick Lett, are hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months. This term consists of 60 months as to each of Counts Five, Seven, Eight, Nine, 10, 11, and 12, said terms to be served concurrently.

The Court recommends that you be imprisoned at an institution where a residential, comprehensive, substance abuse treatment program is available. And from -- and upon release from imprisonment, you

shall be placed on supervised release for a term of three years on each of Counts Five and Seven, and five years on Counts Eight, Nine, 10, 11, and 12, all such terms to run concurrently.

Within 72 hours of release from custody of the Bureau of Prisons, you shall report in person to the Probation Office in the district to which you are released. While on supervised release, you shall not commit any Federal, state, or local crimes, you shall be prohibited from possessing a firearm or other dangerous device, and shall not possess a controlled substance. In addition, you shall comply with the standard conditions of supervised release as recommended by the Sentencing Commission and on record with this Court.

The Court also orders that you comply with the following special condition of supervised release; that is, that you shall participate in a program of testing and treatment for drug and/or alcohol abuse as directed by the Probation Office.

The Court finds that you do not have the ability to pay a fine; therefore, no fine is imposed.

The Court finds that the sentence imposed addresses the seriousness of the offense and the sentencing objectives of punishment, deterrence, and incapacitation, and is determined to be a reasonable sentence as found by applying the factors under Section 3553(a).

It is ordered that you pay a special assessment in the amount of $100 on all seven counts for a total of $700, which is due immediately.

You can appeal your conviction if you believe that your guilty plea was somehow unlawful or

involuntary or if there's some other fundamental defect in the proceedings not waived your guilty plea. you also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law. In any case, you have the right to apply for leave to appeal in forma pauperis, and the Clerk of Court will prepare and file notice of appeal and appoint counsel to represent you upon your request. With few exceptions, any notice of appeal must be filed within ten days of the date of entry of judgment.

Anything further from the Government at this time?

MR. CHERRY: No, sir, Your Honor.

THE COURT: From the Defendant?

MR. CORTELLO: No, sir, Your Honor. Thank you for --

THE COURT: Probation, anything further we need to put on the record?

PROBATION OFFICER MORRIS NORTHCUTT: No, sir.

MR. CHERRY: Judge, I do move to dismiss Count One.

THE COURT: All right. That's right. There's aremaining count. Count One of the indictment is hereby dismissed on the Government's motion.

Is there a request for volantary surrender?

MR. CORTELLO: Yes, sir.

THE COURT: Any objection to voluntary surrender?

MR. CORTELLO: If he could report to the Bureau of Prisons and go directly to the prison facility.

MR. CHERRY: Can I have one moment, Your Honor?

THE COURT: Sure.

(Brief pause.)

MR. CHERRY: Your Honor, I'm not quite clear what Sgt. Lett's immediate status with the military is going to be. I know from talking with the JAG Corps, they -- he cannot stay in the Army. I'm not sure how soon that's going to take effect. I'm not sure what effect that will have on where he would stay, who would be in charge of him, who would make sure he voluntarily surrenders. I would ask for a detention until we can figure that out.

THE COURT: All right. How long do you think it will take to determine, make that determination?

MR. CHERRY: Probably the next five days. I've got to talk to the JAG folks.

THE COURT: All right. The request for voluntary surrender is denied at this time subject to reconsideration on -- after investigation of Sgt. Lett's status.

MR. CHERRY: Yes, sir.

THE COURT: Anything further?

MR. CHERRY: No, sir.

THE COURT: All right.

MR. CORTELLO: Thank you, Judge.

THE COURT: That's all. Good luck to you, Sgt. Lett.

(Proceedings concluded at 2:45 p.m. this date.)

CERTIFICATE

STATE OF ALABAMA)

COUNTY OF MOBILE)

I do hereby certify that the above and foregoing transcript of proceedings in the matter aforementioned was taken down by me in machine shorthand, and the questions and answers thereto were reduced to writing under my personal supervision, and that the foregoing represents a true and correct transcript of the proceedings upon said hearing.

I further certify that I am neither of counsel nor related to the parties to the action, nor am I in anywise interested in the result of said cause.

_____

Mary Frances Giattina, RDR, CRR
23 Official Court Reporter
U.S. District Court
24 P.O. Box 3021
Mobile, Alabama 36652-3021
(251) 690-3003

UNITED STATES CODE
TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART II - CRIMINAL PROCEDURE
CHAPTER 227 - SENTENCES
SUBCHAPTER A - GENERAL PROVISIONS

§ 3553. Imposition of a sentence

(a) Factors To Be Considered in Imposing a Sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress

(regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

UNITED STATES CODE
TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART II - CRIMINAL PROCEDURE
CHAPTER 227 - SENTENCES
SUBCHAPTER A - GENERAL PROVISIONS

§ 3553. Imposition of a sentence

(f) Limitation on Applicability of Statutory Minimums in Certain cases.— Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

21 U.S.C. § 841(b)

(b) Penalties. Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving --

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of --

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-

phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of

section 845, 845a, or 845b of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving --

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of --

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be

sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this

subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II , or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised

release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any

sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised

release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed --

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use --

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

(7) Penalties for distribution.--

(A) In general.--Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

(B) Definition.--For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to

appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) ***Later Motion.*** Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to

the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.